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Director

## WORKING SESSION MEMORANDUM

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**DATE:** January 24, 2014

**TO:** Alderman Marcia T. Johnson, Chairman  
Members of the Zoning and Planning Committee

**FROM:** Candace Havens, Director of Planning and Development   
James Freas, Chief Planner, Long-Range Planning  
Robert Muollo, Housing Planner

**RE:** #263-13 ALD. JOHNSON & ALBRIGHT requesting that the Planning Department document a clear and transparent process for the establishment of housing that complies with Massachusetts Chapter 40B statute so that citizens are knowledgeable of the steps needed, decision making points and decision makers.

**MEETING DATE:** January 27, 2014

**CC:** Board of Aldermen  
Planning and Development Board  
Donnalyn Kahn, City Solicitor

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Chapter 40B, also known as the Comprehensive Permit Law, is a State law intended to encourage the development of affordable housing through an alternative development review process that streamlines the permitting process and provides relief from local zoning requirements for projects that include a minimum of 20-25% affordable units. As an alternative housing development process that occurs relatively infrequently in Newton, the process can raise questions for citizens interested in providing comment on a proposed development. Understanding the 40B process starts with these primary facts; 1) there are effectively two versions of 40B, friendly and regular and, for the purposes of this memo, the key difference between them is that a friendly 40B provides three opportunities for public/local comment while a regular 40B affords two such opportunities; 2) while there is involvement by certain State agencies, the 40B process is fundamentally a local one where the decision-making body is the Zoning Board of Appeals (ZBA); and 3) where a community has less than the required 10% of its housing affordable to low and moderate-income households, the decision-making authority of

the ZBA is strictly curtailed by the special right of appeal that essentially says that a denial by the ZBA will be overturned unless it is determined that the project presents serious health or safety concerns that cannot be mitigated. The following memo looks at this process in greater detail, with particular attention paid to the roles of local elected and appointed officials and opportunities for public comment.

## The Comprehensive Permit (40B) Review Process

### 1. Determination of Project Eligibility

A nonprofit, for-profit or governmental agency may apply to develop housing under Chapter 40B as long as 20-25% of the proposed housing qualifies as “low or moderate-income” housing. By definition, low or moderate income housing must receive some form of state or federal subsidy.

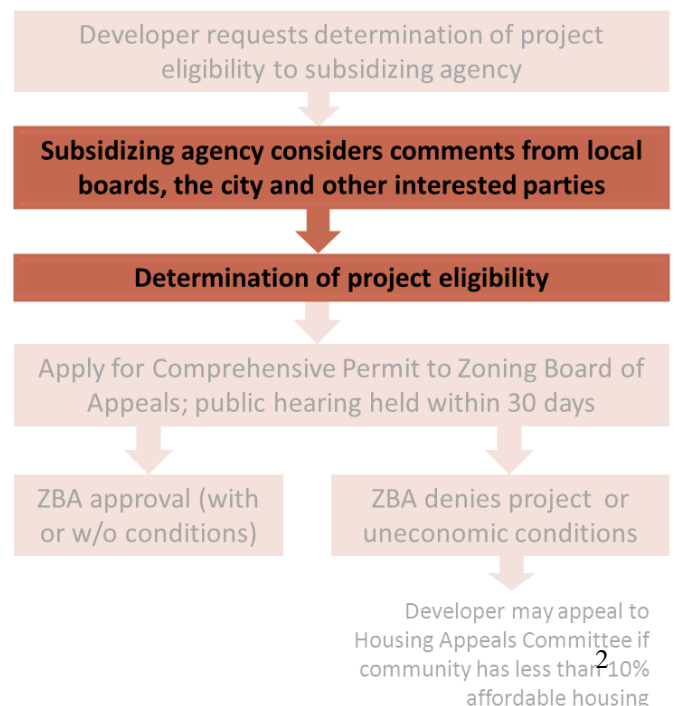
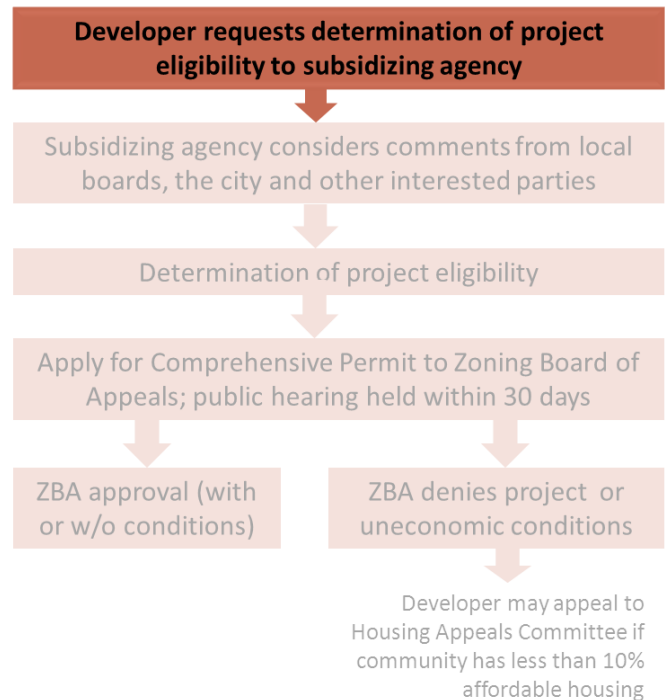
Therefore, before an entity can apply for a comprehensive permit, the entity and the project must first qualify through a state or federal

**subsidizing agency** (typically MassHousing, MA Department of Housing and Community Development or the Massachusetts Housing Partnership). This qualification takes the form of a **project eligibility letter**. This letter signifies that

the proposed site is generally suitable for the type of housing proposed, eligible for a public subsidy, and appears to be financially feasible. The project eligibility letter effectively serves as an indication from the subsidizing agency that the project will receive a subsidy and therefore qualifies as low or moderate income housing under the law.

### 2. Public Comment on Project Eligibility

Once in receipt of the application, the **subsidizing agency** will provide written notice to the Mayor, initiating a **30-day review period**. During the course of the review period, the subsidizing agency will conduct a site visit, which local officials may attend, and will also accept written comments from local boards and other interested parties. The subsidizing agency will consider comments received prior to issuing a determination of project eligibility. Subsequent decisions related to the project are within the sole purview of the ZBA.



### 3. Public Hearing with the Zoning Board of Appeals

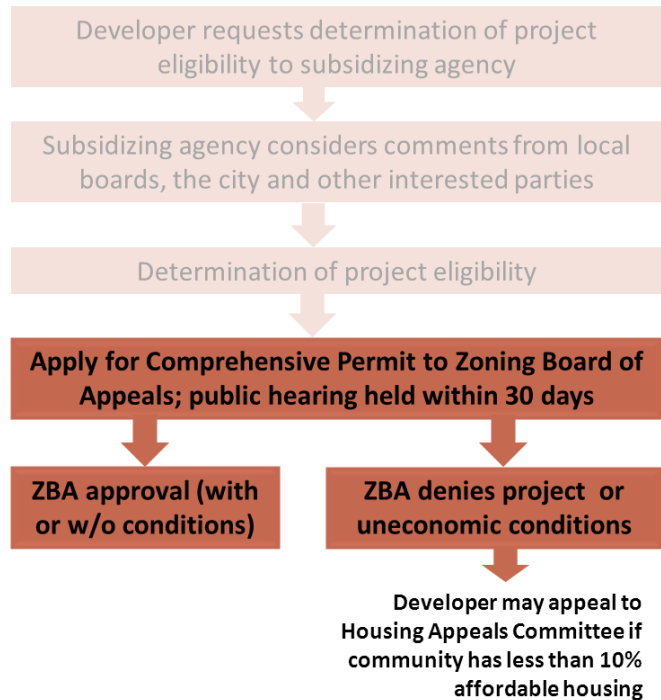
The ZBA is the official permitting entity for 40B applications. With a project eligibility letter, a developer is able to submit an application to the ZBA and begin the review process. The ZBA must open a **public hearing** within 30 days of the application date. The ZBA notifies property abutters by mail in advance of the public hearing. Notice of 40B applications is also typically included in the Planning Department's *Friday Report*.

City departments submit technical analyses and recommendations to the ZBA. Along with oral testimony at the hearing, the public and local officials are invited to comment in writing while the public hearing is open. These letters and all project documents submitted to the ZBA become a matter of public record. The hearing is deemed terminated when all public testimony has been received and all information requested by the ZBA has been received (*see Attachment A*).

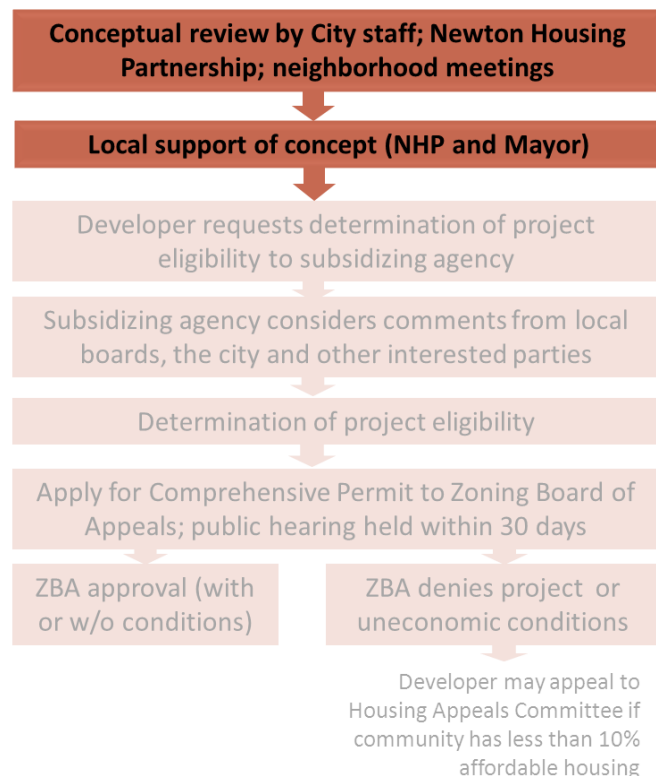
Once the ZBA closes the public hearing a decision must be issued in 40 days, unless the time period is extended by written agreement by the ZBA and applicant. The ZBA may approve the project as submitted, approve the project with conditions, or deny a comprehensive permit as not consistent with local needs. If the application is approved, a comprehensive permit is issued. The applicant must still obtain permits required by state statute, including a local building permit. If the ZBA rejects the project, or imposes conditions that the applicant believes makes the project economically infeasible, the applicant may appeal the decision to the state Housing Appeals Committee (HAC) within 20 days of the ZBA's filing. If the ZBA approves the comprehensive permit, any person aggrieved may appeal within 20 days of the ZBA's filing. Where the ZBA denies a project, the HAC may overrule the local decision unless it is determined that the project presents serious health or safety concerns that cannot be mitigated. The HAC may also reduce or eliminate conditions imposed on a project where the developer can demonstrate that such conditions make the project economically infeasible. This appeal option is only available for developers in communities that have not achieved 10% of all housing units as affordable to low or moderate income households.

### **The Local Initiative Program (Friendly 40B)**

The Local Initiative Program, also known as "Friendly 40B", allows for an additional, earlier step in the 40B process in which a developer meets with **City officials** and the **public** in an effort to win early support for the project. This additional step creates an opportunity for public involvement and staff



participation early in the project, where potential influence is the greatest. In exchange, the developer hopes that the later ZBA review process will proceed more quickly. In a Friendly 40B, the **Newton Housing Partnership** and **City staff** review and comment on the project and the **Mayor** signs a letter of support that is submitted to the Department of Housing and Community Development. A Friendly 40B therefore provides one additional opportunity for public comment over the two normally provided during the overall 40B process.



## Public, Government, and Developer Roles

The chart below identifies key stakeholders and their roles in the process. The decision making authority in Chapter 40B is the local Zoning Board of Appeals and the State Housing Appeals Committee.

<b>Newton Housing Partnership</b> Advisory review; Project eligibility support	<b>City Departments</b> Advisory and Technical Reviews, Encourage outreach	<b>Board of Aldermen</b> Attend neighborhood meetings, ZBA hearing	<b>General Public</b> Attend neighborhood meetings, ZBA hearing
<b>Monitoring Agent</b> Monitors compliance	<b>Mayor</b> Project eligibility support	<b>Subsidizing Agency</b> Determines Site eligibility; establish/enforce profit limitation	<b>Conservation Commission</b> Advisory review
<b>Developer</b> Entitled to public hearing and decision; no legal obligation to modify proposal	<b>Other local boards</b> Recommendations to ZBA	<b>Zoning Board of Appeals</b> Grants all local approvals; impose conditions	<b>Housing Appeals Committee</b> Can overrule local decision

## General Timeline

Chapter 40B contains specific performance deadlines once a comprehensive permit application is submitted to the ZBA. The timeline below provides estimates of the process including the Local Initiative (Friendly 40B) component. It does not reflect every deadline within the ZBA review process.

<b>Local Initiative Program</b>			
<b>Preliminary reviews; neighborhood meetings</b>	<b>Project Eligibility Determination; comment period</b>	<b>ZBA Public Hearing</b>	<b>ZBA Decision</b>
2-4 months	2-3 months	Up to 6 months	40 days from close of public hearing <sup>1</sup>

## **Housing Production Plans**

An option available to municipalities in Massachusetts to address affordable housing and vulnerability to 40B developments is to adopt a Housing Production Plan. A Housing Production Plan must be approved by the State Department of Housing and Community Development (DHCD) and certified annually with regard to the community having met its housing production targets. The plan must include a detailed analysis of the local housing market identifying needed housing, based on demographic trends and other factors, obstacles to housing creation and strategies for addressing those obstacles, and identify the target housing production goals, which are based on a percentage of existing housing units according to the census. At a minimum, given the number of housing units in Newton at the time of the 2012 Census, Newton would need to produce 162 affordable units eligible for inclusion on the State Housing Inventory (SHI) per year for the plan to be certified. With a certified plan, a developer would no longer be able to appeal the denial of a Comprehensive Permit (40B application) by Newton's ZBA.

## **Next Steps**

The Planning Department will be creating a user-friendly brochure outlining the major steps in the Chapter 40B process, similar to that created for the special permit process. This information will be available in hard copy and on the department's webpage along with other Chapter 40B resources. As they arise, public meeting and public hearing notices for Chapter 40B – and other high interest projects – will also be posted on the Village Views section of the city's webpage.

*Attachment A - Zoning Board of Appeals Comprehensive Permit Application Guidelines*

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<sup>1</sup> An appeal to the Housing Appeals Committee must be filed within 20 days from the date of the ZBA decision

## **Zoning Board of Appeals**

### **Comprehensive Permit Application Guidelines**

#### **I. Background and Purpose:**

Under Chapter 774 of the Acts of 1969 the Massachusetts Legislature created a mechanism whereby local zoning could be overridden in order to create more housing for low and moderate-income people. The statute is called the Anti-Snob Zoning Act, M.G. L. c. 40B. §§ 20-23.

The Legislature noted: "...there is an acute shortage of decent, safe low and moderate cost housing throughout the Commonwealth...necessary land is often unavailable because of restrictive zoning controls or similar regulation. Moreover, where land is available, the process for obtaining local approval is so protracted as to discourage all but the most determined and well-financed developers who may not necessarily have the interests of the community at heart." Report of the Committee on Urban Affairs (June, 1969). Further explanation of the background and purpose of the Anti-Snob Zoning Act can be is provided in the regulations of the Housing Appeals Committee, 760 CMR 30.01.

These guidelines should be read in conjunction with and implemented in a manner consistent with the complete regulations of the Housing Appeals Committee, 760 CMR 30.00 and 31.00 and with the Guidelines for Local Review of Comprehensive Permits, published periodically by the Department of Housing and Community Development. In addition, the Board's general rules for conduct of hearings under M.G.L. c. 40A apply to comprehensive permit applications.

The Comprehensive Permit limits the length of the permit process as well as the number of boards or agencies from which the applicant must seek approval.

#### **II. Process:**

##### **A. Preliminary Review**

An applicant may apply to the Newton Zoning Board of Appeals ("ZBA") at any time for a comprehensive permit. An applicant is encouraged to first meet with neighbors prior to submission of an application and to keep neighbors apprised of all proceedings with City Departments. Next an applicant is encouraged to meet with the Inspectional Services Department to determine the relief to be requested, then the Planning Department to review the plans for completeness, accuracy and compatibility with good planning and development practices, including traffic, housing and land use objectives. The Planning Department may suggest ways that the plans and the application might be improved. The applicant can gain information about the history or physical features of the site, as well as the Department's professional expertise. The applicant is also encouraged to meet early with the Newton Housing Partnership for their review and recommendations concerning the proposal. An applicant is also encouraged to inform their local Aldermen prior to submitting the application to the ZBA.

The applicant is advised to contact the City Engineer to review the adequacy of utilities and roadways in the area; the Fire Department to review safety, including emergency

access and applicable fire codes; Public Works Department to review traffic, trash removal and approve necessary curb cuts; Inspectional Services Department to review zoning and building code issues; and the Environmental Planner (staff person to the Conservation Commission) in the Planning Department to review wetlands and environmental issues. The Planning Department shall include a notice of the application in its Friday report to the Mayor, Board of Aldermen and interested citizens.

It is suggested that the applicant refer to the Zoning Ordinance as a guideline to the development the areas around the site can sustain. This particularly applies to setback, F.A.R., build factor, height and stories and parking requirements provided in Section 30-15, parking requirements of Section 30-19, as well as any pending amendments which may be in front of the Board of Aldermen at the time of submission. The Planning Department shall submit a report to the ZBA providing a technical and planning analysis of the application.

Zoning requirements may be overridden by the ZBA if inconsistent with local needs as defined in M.G.L. c. 40B, § 20. The ZBA may impose conditions that do not make the project uneconomic as defined in M.G.L. c. 40 B, §20.

#### B. Other Required Reviews

Other regulations required by state law that may apply must still be adhered to, such as Massachusetts Environmental Policy Act Regulations, 310 CMR 11.00 *et seq.* ("MEPA") and the Wetlands Protection Act Regulations, 310 CMR 11.00 *et seq.* An Environmental Notification Form under MEPA is required if a Comprehensive Permit application proposes more than 100 housing units.

If there are wetlands or water bodies on or near the site, the applicant is advised to contact the Environmental Planner for the Conservation Commission as early as possible to identify any potential environmental problems.

### III. Submission Requirements

The application for a comprehensive permit shall include:

1. Preliminary site plan stamped and signed by a registered land surveyor depicting:

Location and footprint of all proposed buildings.

Proposed location, general dimensions and materials for streets, drives, parking areas, walks and paved areas.

Existing and proposed topography, including landscaping improvements and open areas.

2. A report on existing conditions and a summary of conditions in the surrounding areas, showing:

Location and nature of existing buildings, existing street elevations, traffic patterns and character of open areas, if any, in the neighborhood.

A neighborhood plan showing abutting lots and listing the owners of those properties.

3. Preliminary architectural, scaled drawings for building plans stamped and, signed by a registered architect illustrating:

Typical floor plans.

Typical elevations and sections.

Identification of construction type and exterior materials.

4. Table of the proposed buildings by type, size (number of bedrooms and, floor area) and ground coverage.
5. Summary showing the lot area in square feet and percentage of the tract to be occupied by buildings, parking and other paved areas, and areas to remain as open space.
6. Preliminary utilities plan showing the location and types of sewage, water and drainage facilities including hydrants.
7. Where a subdivision of land is involved, a preliminary subdivision plan.
8. Documents showing that the applicant fulfills the jurisdictional requirements of 760 CMR 31.01, that is:
  - The applicant is a public agency, a non-profit organization, or a limited dividend organization;
  - The project shall be fundable by a subsidizing agency under a low and moderate income housing subsidy program; and
  - The applicant shall control the site.
9. A list of requested exceptions to Newton's ordinances.
10. A statement showing why any housing units greater than the maximum density allowed by the zoning are economically necessary.
11. Local supply of affordable housing and current projects to add to supply.
12. A filing fee according to the following schedule:

Comprehensive permit petitions:	\$2,000.00 plus \$50.00 per unit
Non-profit – 7 or more units:	\$1,000.00 plus \$50.00 per unit
Non-profit – 6 or less units:	\$350.00



#### **IV. Criteria for Decision**

In considering the application for a Comprehensive Permit, the ZBA shall consider the following:

1. The health and safety of the residents of the proposed housing and the current residents of the City.
  - Structural soundness of the proposed buildings.
  - Adequacy of sewage disposal.
  - Adequacy of handling water runoff.
  - Adequacy of fire protection.
  - Adequacy of handling traffic generated by the project on adjacent streets.
  - Proximity of the site to industrial activities which might affect the health of the proposed residents.
2. Height, bulk and placement of the proposed buildings, accessory structures and improvements.
  - Physical characteristics of the proposed housing.
  - Physical characteristics of the surrounding land.
  - Adequacy of access to the site and adequacy of parking arrangements.
  - Adequacy of open areas.
3. The economic need to require additional housing units.
  - General feasibility of the project.
  - Limitations imposed by the financing agency with respect to size or character of the development, amount or nature of the subsidy and permissible rentals and tenant limits.
  - Changes in rents and units sizes of the development which would be necessary to accommodate the requirements and regulations sought to be imposed.
4. Local supply of affordable housing and current projects to add to supply.

#### **V. Public Hearing and Decision**

A complete application for a comprehensive permit shall be submitted to the ZBA.

Within seven days of the filing of the application, the ZBA shall notify local officials of the requested exceptions to Newton's ordinances and inviting that official's participation. application by sending such official a copy of the list required by Section III (9) above as to requested exceptions to Newton's ordinances and inviting that official's participation.

The ZBA shall hold a public hearing for a complete application within 30 days. The Chairman of the ZBA shall be responsible for the proper conduct of the hearing. The following is a general guideline to the order of proceeding:

- (a) applicant's presentation
- (b) local officials
- (c) those appearing in favor of the application
- (d) those appearing in opposition to the application.

The ZBA shall render a decision, based on a majority vote of the Board, within forty days after termination of the public hearing, unless such time period is extended by written agreement of the Board and the applicant. The hearing is deemed terminated when all public testimony has been received and all information requested by the Board has been received.

The ZBA may dispose of the application in the following manner:

- . approve a comprehensive permit on the terms and conditions set forth in the application,
- . deny a comprehensive permit as not consistent with local needs, or
- . approve a comprehensive permit with conditions with respect to height, siteplan, size, shape or building materials that do not render the construction or operation of such housing uneconomic.

## **VI. Appeals**

If the ZBA approves the comprehensive permit, any person aggrieved may appeal within the 20 day time period and to the court provided in M.G.L. c. 40A, § 17.

If the ZBA denies the comprehensive permit or approves the permit with unacceptable conditions or requirements, the applicant may appeal to the Housing Appeals Committee within the 20 day time period as provided in M.G.L. c. 40B, §22.